Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ASHER RUBINSTEIN,

Cross-Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, AND WILLIAM C. VAN BUSKIRK,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

In this employment discrimination case, summary judgment was granted against the plaintiff his national origin and religious discrimination claims, but he was allowed a jury trial on one of his retaliation claims. The jury found in his favor, awarding $2500 in compensatory damages and $75,000 in punitive damages. The District Court also awarded as prospective relief a 3.5% pay raise, which equals approximately $40,000 over ten years. The United States Court of Appeals for the Fifth Circuit affirmed the summary judgment, but reduced the punitive damage verdict, holding that the thirty to one ratio of punitive to compensatory damages was unreasonable. The Fifth Circuit refused to consider the value of the prospective relief in calculating the damages against which the punitive award is to be measured.

1. After this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), should a plaintiff who has concededly demonstrated a prima facie employment discrimination case, who has concededly presented sufficient evidence for a jury to find pretext, and who has concededly presented sufficient evidence for a jury to find that one decisionmaker was motivated by bias, that other decisionmakers made discriminatory remarks about his national origin and religion, and that his employers altered his evaluations in an effort to inhibit his advancement, be allowed to present his discrimination claims to a jury?

2. Does the "stray remarks" doctrine of the United States Court of Appeals for the Fifth Circuit survive this Court's decision in *Reeves*?

3. In evaluating the reasonableness of a jury's punitive damage verdict, should the value of prospective relief be considered when calculating the damages against which the punitive award is to be measured?

4. Even if prospective relief must be excluded, is a thirty to one ratio of punitive to compensatory damages so unreasonable as to be unlawful?

5. What is the standard of review of a trial court's ruling on a challenge to the reasonableness of a punitive damage award?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

ASHER RUBINSTEIN,
Cross-Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, AND WILLIAM C. VAN BUSKIRK,
Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12.5 of the rules of this Court, Cross-Petitioner Asher Rubinstein requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit. He is the Respondent to the Petition for Writ of Certiorari filed by the cross-respondents here. *Administrators of the Tulane Educational Fund v. Rubinstein*, No. 00-789.

OPINIONS BELOW

The July 6, 2000 opinion of the Court of Appeals in the present matter is reported at 218 F.3d 392 (5th Cir. 2000), and is reproduced in Appendix A to Tulane's petition. No. 00-789,

p. 1a (hereafter "pet. app."). The March 20, 1998 of the United States District Court for the Eastern District of Louisiana granting partial summary judgment against the plaintiff, Mr. Rubinstein, is unreported and is reproduced in Appendix E to Tulane's petition. Pet. App. 43a. The March 6, 1998 opinion of the District Court granting partial summary judgment against Rubinstein on other claims is reported at 58 F.Supp.2d 702 (E.D. La. 1998), and is reproduced in Appendix F to Tulane's petition. Pet. App. 48a.

JURISDICTION

The opinion of the Court of Appeals was issued on July 6, 2000. A timely petition for rehearing was denied on August 14, 2000. Tulane's petition was filed on November 13, 2000, and docketed on November 16, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 2002e-2(m) and § 2000e-3(a), which are reproduced in Appendix I of Tulane's petition. Pet. App. 106a-107a.

STATEMENT OF THE CASE

The Cross-Petitioner, Asher Rubinstein, is a Jewish man, raised in the former Soviet Union, and a tenured member of the faculty of mechanical engineering at Tulane University. He was hired as an Associate Professor in 1987 and achieved tenure in 1990. His tenure recommendation pointed out that he was "an outstanding researcher" and a "satisfactory teacher." Pet. App. 2a-3a. However, after being denied raises or awarded much lower raises than his colleagues between 1993 and 1997, and being denied promotion to Full Professor on multiple occasions during those years, he filed suit in the United States District Court for the Eastern District of Louisiana alleging

unlawful discrimination and retaliation.

All of his claims were denied by way of summary judgment except a retaliation claim related to the refusal of a raise in 1997. A jury heard that claim and found in Mr. Rubinstein's favor, awarding $2500 in compensatory damages and $75,000 in punitive damages. The District Court also ordered that Mr. Rubinstein receive a 3.5% raise as a prospective remedy for the unlawful retaliation. The United States Court of Appeals for the Fifth Circuit affirmed the grants of summary judgment against Rubinstein and affirmed the verdict in his favor on the retaliation claim, but remitted the punitive damage verdict. In so doing, the Court of Appeals refused to consider the 3.5% pay raise as part of the damages against which the punitive award was to be measured. That left only the $2500 in compensatory damages against which to compare the $75,000 punitive award. The Court held that the resulting thirty-to-one ratio was too high and reduced the jury's punitive damage verdict by two-thirds to $25,000. *Id.* 27a-33a.

As the record demonstrates, Rubinstein's problems at Tulane began after 1991, when William Van Buskirk was promoted to Dean of the School of Engineering, and 1992, when Paul Michael Lynch was named Chair of the Department of Mechanical Engineering. In 1993, Rubinstein was denied a raise. When he asked Van Buskirk about this, the Dean said that Lynch might have refused to give Rubinstein the raise because Rubinstein is Jewish and Russian. Rubinstein was given the lowest raise in the department in 1994, after which he again went to Van Buskirk, who said: "what are you going to do, sue me? Do you know what happens to people who sue their employer?" Rubinstein filed a complaint with the EEOC in December of 1994. He was denied promotion to the rank of Full Professor in early 1995. He filed a second complaint with the EEOC in April of 1995. Soon thereafter, he received the lowest raise in the department. He filed this lawsuit on October 11, 1995. *Id.* 3a-4a.

In both 1996 and 1997, Rubinstein again was denied promotion to Full Professor, and was denied a raise in 1997. (He also was denied a raise in 1996 due to a salary freeze for tenured faculty and does not complain of that incident). *Id.* 4a-5a. Rubinstein amended his complaint to include these subsequent actions. Van Buskirk later admitted that the 1997 raise was denied because Rubinstein, by filing suit, had demonstrated he was not a "good colleague." *Id.* 16a-17a.

As previously stated, the record includes documentation showing Rubinstein to be an "outstanding researcher" and "satisfactory teacher," evidence that Van Buskirk believed Lynch to be motivated by unlawful discrimination, threats by Van Buskirk to Rubinstein about what would happen if he sued, and an admission by Van Buskirk that the 1997 raise was denied in retaliation for Rubinstein's lawsuit. In addition, as the Fifth Circuit held, Rubinstein produced evidence sufficient to show that the defendants' stated reason for denying the raises and promotions was pretextual; that his superiors had tampered with and altered teaching evaluations in order to stack the deck against him; and that two members of the Committee that plays a role in the relevant decisions made discriminatory remarks toward Rubinstein. One, Professor Watts, called Rubinstein a "Russian Yankee" and a "commie," and made anti-semitic comments. Another, Professor Bruce, told another professor that if "the Russian Jew" could obtain tenure, anyone could. *Id.* 3a, 11a-13a, 16a-17a. Nevertheless, the Fifth Circuit affirmed the grant of summary judgment against Rubinstein on the discrimination claims, and with respect to the one retaliation claim that did go to trial, reduced the punitive damages award by two-thirds, from $75,000 to $25,000. Pet App. 33a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS CONTINUES, EVEN AFTER *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*, TO ARROGATE UNTO ITSELF THE ROLE OF THE JURY IN EMPLOYMENT DISCRIMINATION CASES.

As the Fifth Circuit acknowledged, there was enough evidence for a jury to conclude the existence of a prima facie case, of pretext, of the alteration of student evaluations, of discriminatory and anti-semitic remarks by decisionmakers, and of a statement by the Dean that unlawful discrimination may have motivated actions of the department chair. Pet. App. 3a, 11a-13a. But even though the jury could have concluded that all of these things occurred, the Fifth Circuit upheld the District Court's decision granting summary judgment on the discrimination claims.

In so doing, the Fifth Circuit said:

> While we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext, *see Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, *5, discrimination suits still require evidence of discrimination. . . . Rubinstein has failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive as to support an inference that the real reason was discrimination.

Pet. App. 12a. The Court also held that because there was no proof that the discriminatory remarks of decisionmakers were

proximate in time or made in relation to the negative employment decisions, the comments "are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment." *Id.* 13a, *citing, Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999).

This Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), held that the Fifth Circuit had, in that case, "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at 2111. Because the plaintiff there had "established a prima facie case of discrimination, introduced enough evidence for the jury to reject [the defendant's] explanation, and produced additional evidence of age-based animus," this Court held "there was sufficient evidence for the jury to find that [the defendant] had intentionally discriminated." *Id.* at 2112. Similarly, in the present case, the plaintiff established a prima facie case, introduced enough evidence for the jury to reject the defendant's explanation, and produced additional evidence of discriminatory animus. Yet the Fifth Circuit once again, as in *Reeves*, substituted its judgment for that of the jury.

This is not the only recent case in which the Fifth Circuit has failed to follow the lesson of *Reeves*. In *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000), *pet. for cert. filed*, No. 00-806 (Nov. 17, 2000), the Court of Appeals reversed a jury verdict finding national origin discrimination. It did so despite its own conclusion that a prima facie case had been established and that sufficient evidence existed to support the jury's finding that the defendants' explanation was pretextual. While acknowledging this Court's decision in *Reeves*, the Fifth Circuit in *Vadie* nevertheless held that reversal of the jury verdict was required because of the plaintiff's failure to produce evidence beyond the prima facie and pretext showings that had been made. *Id.* at 373-374.

The same mistake was made in *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000), *pet. for cert. filed*, No. 00-820 (Nov. 20, 2000), a decision issued about two weeks prior to this Court's opinion in *Reeves*. There, the Fifth Circuit reversed a jury verdict finding age discrimination, holding that while the plaintiffs' evidence "might have been sufficient to cast doubt on [the defendant's] proffered explanations for plaintiff's discharges, . . . it did nothing to raise an inference that the real reasons for the discharges were related to age." *Id.* at 306.

This Court's decision in *Reeves* makes it clear that federal courts generally should not grant judgment against a plaintiff as a matter of law where evidence has been produced sufficient to prove a prima facie case and to prove that the defendant's proffered explanation is pretextual. 120 S.Ct. at 2109. Of course, *Reeves* did say that "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* But the illustrative examples mentioned by this Court in *Reeves* demonstrate that such situations are rare: "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* Neither in the present case nor in *Vadie* or *Wyvill* was there some "other, nondiscriminatory reason" for the challenged decisions that was "conclusively revealed" by the trial record, and none of these cases contain "uncontroverted independent evidence that no discrimination had occurred."

Unfortunately, the Fifth Circuit continues, even after *Reeves*, to arrogate unto itself the role of jury. Because its decision in the present case is part of a pattern of decisions that

contravene the principles expressed in *Reeves*, certiorari should be granted here.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE FIFTH CIRCUIT'S "STRAY REMARKS DOCTRINE" SURVIVES THIS COURT'S DECISION IN *REEVES*.

As previously noted, the Fifth Circuit in this case discounted key evidence of discrimination because, it said, there was no proof that discriminatory remarks by members of the relevant committee were proximate in time or made in relation to the negative employment decisions. Thus, said the Court, these comments "are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment." *Id.* 13a, *citing, Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999). The Fifth Circuit has applied this doctrine in other recent cases. *See, Wyvill v. United Companies Life Ins. Co.*, 212 F.3d at 304.

However, in *Reeves*, this Court criticized the Fifth Circuit's practice in this regard. According to this Court, the Fifth Circuit, in refusing to consider age-related comments by those involved in employment decisions "on the ground that they 'were not made in the direct context of [plaintiff's] termination,'" had "failed to draw all reasonable inferences in favor of [the plaintiff]." *Reeves*, 120 S.Ct. at 2111.

In the present case, the Court of Appeals, as it has done so often in employment cases, utilized its "stray remarks" doctrine to discount evidence of discriminatory remarks by decision-makers. This led the Court to uphold the grant of summary judgment here and deny the plaintiff a jury trial on the issue of national origin discrimination. Certiorari should be granted to determine if this doctrine survives this Court's decision in *Reeves*.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT ISSUES REGARDING JUDICIAL REVIEW OF PUNITIVE DAMAGE VERDICTS BY JURIES THAT ARE RAISED BY THIS CASE.

Although the Court of Appeals reviewed the punitive damages award for federal statutory excessiveness rather than constitutional excessiveness, the Court stated that the three-factor analysis it utilized is based on, and is no different than, the constitutional test prescribed by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Pet. App. 28a-31a. Moreover, while the Court of Appeals described this as a "non-constitutional challenge to punitive damages," *id.* at 31a, it concluded its opinion by stating that the reduced award after the remittitur "does not test the boundaries of the Due Process clause." *Id.* at 32a. Thus, at least some of the issues raised by this decision apply both to consititutional and non-constitutional analyses of punitive damage awards.

With respect to the first of the three factors -- degree of reprehensibility, *BMW*, 517 U.S. at 575 -- the Court of Appeals held that Tulane's action "demonstrate[s] a high degree of reprehensibility under the First *BMW* factor." Pet. App. 30a. But despite that degree of reprehensibility, the Court of Appeals' approach to the second factor -- the "ratio" of the punitive damages "to the actual harm inflicted on the plaintiff," *BMW*, 517 U.S. at 580 -- led to the reduction of the punitive damages award from $75,000 to $25,000. Specifically, the Court of Appeals refused to consider the prospective 3.5% pay raise as part of the damages against which the ratio of the punitive award is to be calculated. It did so, it said, because "[t]he pay-raise is prospective relief to correct a wrong previously committed, while the punitive damages award is properly the tool used to correct the retrospective harm." Accordingly, said the Court, the ratio could only take into account "the compensatory damages awarded for the prior harm." Pet. App. 31a.

Once it excluded the pay raise, the Court of Appeals ruled that the thirty-to-one ratio of the $75,000 punitive verdict to the $2500 compensatory damage award was "so disproportionate as to 'raise a suspicious judicial eyebrow,' and require a remittitur." Pet. App. 31a, *quoting, TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting). In light of its ruling on this second *BMW* factor, the Court said it "need not examine the third prong of the *BMW* test." Pet. App. 31a. The Court remitted the award from $75,000 to $25,000 so that it would fit within the ten-to-one ratio authorized in *TXO*. Pet. App. 32a.

The Court of Appeals' decision raises several important issues of federal law that should be resolved by this Court relating to judicial review of punitive damage verdicts issued by juries.[1]

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[1] After remand by the Fifth Circuit, the District Court ordered plaintiff Rubinstein to declare, within thirty days, whether he would accept the remittitur or insist on a new trial. Rubinstein informed the Court that, if ultimately faced with the choice, he would forego the new trial, but he also made it clear that, for present purposes, he "reserv[es] [his] rights to seek writs to the United States Supreme Court on the remittitur issue and all other issues in the case." *See* the appendix to this cross-petition. Although there is some suggestion in the case law that acceptance of a remittitur forecloses a right to appeal, *see, Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), the question should not be foreclosed on this conditional cross-petition for certiorari. First, Rubinstein's response to the District Court order simply was an articulation of the decision he intends to make if still faced with the choice after any review by this Court. Second, this is not a district court remittitur being appealed to a court of appeals, but a court of appeals remittitur in which certiorari is being sought in this Court. Third, Rubinstein is raising the issue on this cross-petition only after the certiorari process has been invoked by Tulane. Thus, this case is quite different from the situation in *Donovan*, where the plaintiff accepted a district court remittitur and thus was foreclosed from appealing it to the Court of Appeals.

A. By Adopting a Rule That Prospective Relief Must be Excluded from the Calculation of Damages Against Which the Ratio of a Punitive Award is to Be Measured, the Court of Appeals Decision Conflicts With This Court's Rulings in BMW v. Gore and TXO Production Corp. v. Alliance Resources Corp.

In *BMW*, this Court said "[t]he second . . . indicium of an unreasonable or excessive punitive damages award is its ratio to the *actual harm* inflicted on the plaintiff." 517 U.S. at 580. (emphasis added). It traced language from *TXO* and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and said:

> [T]he proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *TXO*, 509 U.S. at 460 (emphasis in original), quoting *Haslip*, 499 U.S. at 21. Thus, in upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.

BMW, 517 U.S. at 581.

Obviously, the money a plaintiff will lose in the future because a pay raise has been illegally denied is part of the "actual harm inflicted" on him, and is part of the "harm to the victim that would have ensued if the [illegal] plan had succeeded." The Fifth Circuit's distinction between, on the one hand, "prospective relief" and, on the other, "compensatory damages for prior harm" simply makes no sense where the proper measure is the "harm . . . that would have ensued if the [illegal] plan had succeeded."

Indeed, in *TXO*, this Court upheld a $10 million punitive damage verdict where the compensatory damages were only $19,000 because "the actual value of the 'potential harm'" to the plaintiffs was at least one million dollars and thus within an acceptable ratio. 509 U.S. at 446, 462. Just as the plaintiff in that case would have lost at least one million dollars if the defendants had succeeded in their wrongful conduct, so the plaintiff here would have lost the future value of his pay raise.

The prospective raise of 3.5% in this case will equal approximately $33,000-$40,000 over the next ten years. Record, Vol. 10, pp. 123-124. This is a ratio of approximately two to one, which clearly is not excessive. In light of the conflict between the Fifth Circuit ruling and this Court's decisions, certiorari should be granted to determine whether prospective relief should be included in analyzing the reasonableness of punitive damage jury verdicts.

B. Even if the Court of Appeals Acted Properly in Excluding Prospective Relief From the Analysis, Its Decision Raises the Unresolved Question of Whether a Thirty to One Ratio of Punitive to Compensatory Damages is So Unreasonable as to be Unlawful.

Although the Court of Appeals acknowledged that a ratio of ten to one is not excessive in light of *TXO*, it said that the ratio of thirty to one in this case "is so disproportionate as to . . . require a remittitur." Pet. App. 31a. While this Court held in *BMW* that a 500 to one ratio is excessive, it has not resolved this issue in any case falling between the *BMW* and *TXO* figures. *BMW* did say that "*[i]n most cases*, the ratio [represented by the jury's award] will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." 517 U.S. at 583 (emphasis added). But it was purely on this basis -- the second *BMW* factor -- that the Court of Appeals struck down the jury's punitive damage verdict in the present case. Thus, certiorari should be granted.

C. *This Case Raises the Same Issue Upon Which This Court Granted Certiorari in Cooper Industries v. Leatherman Tool Group, Inc., No. 99-2035: What is the Standard of Review of a Trial Court's Ruling on a Challenge to the Constitutionality of a Punitive Damage Award?*

This Court has granted certiorari to determine the standard of review that federal appellate courts should apply when reviewing a trial court's ruling on the reasonableness of a punitive damages award. *Cooper Industries v. Leatherman Tool Group, Inc.*, No. 99-2035 (Cert. granted Oct. 10, 2000). The same issue exists here. The federal district judge who presided in this case held that the jury's award was reasonable and rejected Tulane's request for a remittitur. Pet. App. 34a-37a. The Fifth Circuit reversed without according any deference to the District Court's decision. Although the Fifth Circuit did not discuss the standard of review, its opinion proceeds as if the Court were examining the question de novo.

The major difference between *Cooper Industries* and the present case is that *Cooper Industries* involves the constitutionality of a punitive damages award, while the Fifth Circuit in the present case couched its decision as one based on a non-constitutional analysis of excessiveness. But if this Court concludes in *Cooper Industries* that the abuse of discretion standard is proper in a constitutional case, it also is proper in a non-constitutional case, thus requiring a remand for reconsideration in the present matter. Even if this Court holds otherwise in *Cooper Industries* and adopts a de novo standard in constitutional cases, certiorari should be granted here to determine the question in non-constitutional settings. Given the special role that appellate review plays in the protection of constitutional rights, it is conceivable that a de novo standard could apply in constitutional cases but an abuse of discretion standard in non-constitutional ones. This is particularly true in an employment retaliation case such as this one, where Congress has statutorily capped the amount of punitive

damages at $300,000, 42 U.S.C. § 1981a, thus reducing the danger of unconstitutionally excessive awards.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ASHER RUBINSTEIN	**CIVIL ACTION**
VERSUS	**NO: 95-3343**
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL.	**SECTION: "S" (5)**

ORDER

(Filed Jul. 26, 2000)

Pursuant to the ruling of the United States Court of Appeals for the Fifth Circuit, Asher Rubinstein is hereby **ORDERED** to inform the court in writing within 30 days whether he accepts the remittitur of punitive damages from $75,000 to $25,000, so that the court may enter judgment accordingly, or whether he refuses the remittitur, so that the court may grant a new trial solely on the issue of punitive damages.

NEW ORLEANS, LOUISIANA, THIS 26th DAY OF July, 2000.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ASHER RUBINSTEIN	**CIVIL ACTION**
versus	**NO: 95-3343**
THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, MICHAEL LYNCH AND WILLIAM C. VAN BUSKIRK	**JUDGE: LEMMON**
	SEC. "S"-1

****

PLAINTIFF'S NOTICE REGARDING REMITTITUR FILED AS PER THE COURT'S ORDER

(Filed Aug. 28, 2000)

NOW INTO COURT, through undersigned counsel, comes plaintiff, Asher Rubinstein, who with respect notifies the Court that given the choice between a new trial solely on the issue of punitive damages or a remititur of the punitive damages award from $75,000.00 to $25,000.00, plaintiff, Asher Rubinstein choses [sic] remittitur under protest, with a reservation of rights to seek writs to the United States Supreme Court on the remittitur issue and all other issues in the case.

Respectfully submitted,

BY: /s/ William M. McGoey
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served upon all parties, by depositing same in the United States mail, postage paid and properly addressed, this 28th day of August, 2000.

/s/ William M. McGoey

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 00-996

IN THE

Supreme Court of the United States

ASHER RUBINSTEIN,

Cross-Petitioner,

v.

THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, and WILLIAM C. VAN BUSKIRK,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Cross-Respondents, The Administrators of the Tulane Educational Fund, Paul Michael Lynch, and William C. Van Buskirk, disagree with Conditional Cross-Petitioner's questions presented for review. The appropriate questions are:

I. Under *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), should a plaintiff-employee be permitted to present his Title VII claims to a jury when he cannot present sufficient evidence as a matter of law to show that his employer's non-discriminatory reasons for denying him increased pay raises and a promotion are false?

II. Should this Court address the viability of the "stray remarks" doctrine in a Title VII case where the court of appeals' opinion need not and arguably did not rely upon that doctrine to affirm the summary dismissal of the employee's discrimination claims?

III. Under *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), should this Court grant plaintiff's conditional cross-petition seeking to restore a $75,000 punitive damage award where the court of appeals remitted the award to $25,000 and where on remand to the district court plaintiff chose "under protest" to accept the remitted amount in lieu of a new trial?

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OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Administrators of The Tulane Educational Fund, Paul Michael Lynch, and William C. Van Buskirk (collectively, "Tulane") urge this Court to deny Asher Rubinstein's Conditional Cross-Petition for a Writ of Certiorari in this case. In its original Petition for a Writ of Certiorari, No. 00-789, filed on November 13, 2000 and now pending in this Court, Tulane seeks review of the Fifth Circuit's decision that affirmed the district court's judgment against Tulane on Rubinstein's Title VII retaliation claim concerning a pay-raise denial in 1997-98, the only claim tried on the merits in this case, and that further remitted a $75,000 punitive damage award to the sum of $25,000. In his Conditional Cross-Petition for Certiorari, Rubinstein now asks this Court to overturn the Fifth Circuit's affirmance of the district court's summary-judgment dismissal of his discrimination claims alleging that Tulane denied him other raises and a promotion because of his national origin and religion as a Russian Jew and to restore the original punitive damage award on his retaliation claim. As explained herein, Rubinstein states no valid reason for this Court to grant him relief.

The court of appeals correctly affirmed the district court's summary dismissal of Rubinstein's claims of religious and national origin discrimination, all of which are unfounded in fact and law. Under this Court's three-part test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), even assuming that Rubinstein had established a prima facie case of discrimination, Tulane refuted that case by presenting substantial evidence of non-discriminatory reasons for denying him pay raises and a promotion.

Summary judgment was warranted because Rubinstein then failed to meet his burden of providing sufficient evidence to prove that Tulane's reasons were pretextual. In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), this Court has reconfirmed the *McDonnell Douglas* test and emphasized that each claimant's situation must be evaluated on a case-by-case basis. A prima facie case, combined with some evidence of pretext, may not always be sufficient to create an issue for the trier of fact. *Reeves*, 120 S. Ct. at 2109. In affirming the summary judgment in this case, the Fifth Circuit correctly applied this Court's analysis in *Reeves*.

Moreover, Rubinstein has waived his right to complain that the Fifth Circuit erroneously remitted his punitive damage award on his sole remaining claim of retaliation under Title VII. On remand in the district court, he accepted the remittitur "under protest" before seeking conditional certiorari review in this Court. In *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649-50 (1977), this Court reaffirmed its longstanding rule that a plaintiff cannot "protest" a remittitur that he has accepted and thereafter attempt to reinstate the original verdict through later appellate review.

STATEMENT OF THE CASE

For the sake of brevity, Tulane adopts and incorporates herein its Statement of the Case from its Petition for a Writ of Certiorari, No. 00-789. Tulane provides the following additional undisputed facts that are relevant to the summary dismissal of all of Rubinstein's discrimination claims:

Rubinstein became a member of Tulane's engineering faculty in January 1987. After he taught one course that

semester, his students unfavorably evaluated his effectiveness as a teacher. The engineering Department Chair, Harold Sogin, informed Rubinstein at that time that he, the Dean, and the Provost were concerned about Rubinstein's "problems meeting our expectations for teaching." (R.2, 369). Nonetheless, Sogin recommended that Rubinstein be appointed for a second year with certain reservations. (R.2, 371).

Rubinstein became eligible for tenure in 1989. Sogin and Dean Harold Thompson recommended that Rubinstein be granted tenure, but again not without reservations. Both Sogin and Thompson outlined their concerns about Rubinstein's ineffectiveness as a teacher. Sogin's memorandum concerning tenure explained that "the student evaluations have been disappointing" and that there is no "hard evidence" that Rubinstein is an outstanding teacher or even an average teacher. (R.2, 371). The Dean's memorandum recommending that Rubinstein be awarded tenure similarly indicated that he made the tenure recommendation "with more uncertainty than I wish were the case" and concluded that the School of Engineering will "have to exercise considerable care about the assignment of Dr. Rubinstein to introductory courses" in the future. (R.2, 337).

If Rubinstein had not received tenure, he would have been terminated. (Tulane Faculty Handbook, Art. III, § 3; R.2, 337). Rubinstein's peers concluded that his ineffective teaching was not so problematic that the drastic step of termination was necessary. But Rubinstein's ineffective teaching skills were consistently and sufficiently problematic to prevent his promotion to Full Professor and to affect his annual salary increases.

Although Rubinstein admitted that some faculty members never achieve the rank of Full Professor and that often there is no salary difference between an associate and full professor (R.2, 385), he began seeking the rank of Full Professor a mere ten months after achieving tenure. The Faculty Handbook defines the rank of Full Professor as an appointment that recognizes a professor of outstanding quality who is a mature scholar of national or international standing and a successful teacher with a record of service to the University. (R.2, 338). Rubinstein's status as an Associate Professor, one step below Full Professor, is defined in the Handbook as being "accorded to an individual who has attained scholarly distinction of high quality as demonstrated by teaching and by published scholarly work. Both areas of accomplishment are essential: high academic achievement in one cannot compensate for deficiencies in the other." *Id.*

Rubinstein sought promotion to Full Professor in 1990, 1993, 1995, 1996, and 1997. Each time the question of Rubinstein's promotion arose, a number of experienced faculty colleagues considered Rubinstein's: (1) teaching effectiveness; (2) scholarly and professional achievement; and (3) University citizenship, as outlined in the Statement of Qualifications for Tenure and Promotion (R.2, 363). The Statement of Qualifications also indicates that no faculty member with marginal effectiveness in teaching can be considered favorably for the rank of Full Professor. (R.2, 364). At the end of each semester, Tulane's engineering students evaluate their professors on standardized forms. The Dean's Office assimilates this information and compiles a five-year average for all faculty on Question 26/16, which inquires about a professor's overall teaching effectiveness. (Supp. R. 77; Plaintiff's Exhibit 105). The five-year average ranked Rubinstein in the bottom third of all engineering faculty. (R.2, 345).

After carefully considering the Statement of Qualifications categories through various levels of review, Rubinstein's colleagues consistently declined to promote him. Dean Thompson, Rubinstein's sole supporter in his quest for promotion, explained that the students' course evaluations are one measure of teaching effectiveness and that Rubinstein "had some of the worst evaluations . . . so my colleagues had a right to review that and the right to vote 'no' on the basis of that." (R.2, 439-40, 443). Professor Watts and Professor Mehrabadi, a native of Iran, confirmed that the Statement of Qualifications governs promotion decisions and that faculty with marginal teaching effectiveness will not be favorably judged. (R.2, 495, 501).

In addition to the students' unfavorable evaluations of Rubinstein's teaching, Associate Dean and Mechanical Engineering Professor Efstathios E. Michaelides, who became the Department Chair upon Sogin's 1990 retirement, indicated that students often came to him personally to complain that Rubinstein was unavailable, unsupportive, and intimidating — qualities indicative of poor university citizenship. (R. 2, 451-453). Furthermore, the faculty noted that Rubinstein did not mentor doctoral students, that his courses did not attract many students, and that he had not performed admirably as the Chair of the Seminar Committee (R. 2, 456-57).

Michael Lynch, who succeeded Michaelides as Department Chair, indicated that concerns about teaching effectiveness and University citizenship directly affected Rubinstein's salary and promotions. (R.2, 468). Lynch explained that since 1987, he has heard students complain that Rubinstein was intimidating, rude, and unprepared, and embarrassed students who do not know the material.

(R.2, 470-75). Lynch also described Rubinstein's strained relationships with the faculty, including derogatory and condescending comments he made toward them. (R.2, 481).

Finally, Tulane presented evidence that Rubinstein was a well-paid Associate Professor and that his annual raises, not unlike consideration for a promotion, were linked with his performance. (R.10, 2000; R.2, 468). Because his teaching effectiveness continuously ranked in the bottom third of the engineering faculty, Rubinstein sometimes received lower salary increases that his colleagues. (R.2, 502).

Notwithstanding his ineffective teaching and poor university citizenship, Rubinstein claims that his failure to receive higher pay raises and a promotion were due to some discriminatory animus toward him based on his Jewish religion and Russian national origin. But Rubinstein must stretch so far to come up with any example of discrimination that he complains that Professor Watts called him a "commie" and a "Russian Yankee" and made anti-Semitic remarks. Watts explained this interchange as follows:

> I have a friendly relationship with Asher Rubinstein, and over the years have socialized with him on numerous occasions. On some of those occasions, minor teasing would occur between the faculty members present. I occasionally called Asher Rubinstein a "commie"; Rubinstein occasionally called me a "redneck." However, I never said anything to Asher Rubinstein that I intended to be insulting or that Rubinstein appeared to be, or in any way indicated that he was, insulted by.

(R.2, 500). Rubinstein's only additional evidence was a remark uttered by Professor Bruce, who said to another professor that if "the Russian Jew" could obtain tenure, then anyone could. (R.4, 765). But as the Fifth Circuit recognized, this does not amount to evidence that casts any doubt on the veracity of Tulane's reasons for denying Rubinstein a promotion and additional increases in salary. (Appendix A, pp. 12a-13a, Tulane's Petition for a Writ of Certiorari, 00-789).

The barriers to Rubinstein's promotion and a higher salary were his consistently ineffective teaching and his substandard university citizenship. Tulane refused Rubinstein's five requests for promotion without regard to his national origin or religion simply because his shortcomings were apparent to three successive Department Chairs, two Deans, and two Provosts, and to his faculty peers of varying national origins themselves. As Dean Van Buskirk explained, thirty-four percent of the faculty are foreign-born, and in Rubinstein's department, four of the nine faculty members are foreign-born. (R.2, 343). Of the four Full Professors in Mechanical Engineering (Lynch, Michaelides, Watts, and Mehrabadi), two are foreign-born. Tulane maintains no information as to the religion of its employees.

The district court thoroughly reviewed all of Rubinstein's summary-judgment "evidence" and found that he had not come forward with sufficient proof "from which a reasonable jury could find that defendants discriminated against him on the basis of his religion or national origin in failing to grant him a full-professorship or a higher salary." (R.7, 1586). Because Rubinstein had failed to carry his burden of proof under Title VII, the court of appeals properly affirmed that ruling. The evidence clearly shows that Tulane had legitimate,

non-discriminatory and non-retaliatory reasons for denying Rubinstein a promotion to Full Professor and certain increases in salary. Rubinstein's evidence was insufficient as a matter of law to prove that these reasons were pretextual.

REASONS FOR DENYING THE CONDITIONAL WRIT

I. Rubinstein's Evidence of Discrimination was Legally Insufficient under *McDonnell Douglas Corp. v. Green* and *Reeves v. Sanderson Plumbing Products, Inc.*

The well-established three-tier approach that this Court first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), provides the method for analyzing a Title VII discrimination claim as follows: (1) the plaintiff must establish a *prima facie* case of employment discrimination; (2) the burden shifts to the defendants to produce a legitimate, nondiscriminatory reason for its actions; and then (3) the burden returns to the plaintiff to prove that the reason stated was false. *See also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2104-05 (2000); *Polanco v. City of Austin, Tex.*, 78 F.3d 968, 975-76 (5th Cir. 1996). At all times, the plaintiff retains the burden of persuading the fact finder that discrimination motivated the complained-of employment decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996).

Under this analysis, a conflict in substantial evidence must exist to create a jury question. *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc); *LaPierre v. Benson*

Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996). In considering a motion for summary judgment in the employment discrimination context, evidence is substantial if it is sufficient to allow a rational jury to make a reasonable inference that some protected classification was a determinative reason for the adverse employment decision. *Id.* (*citing Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc)). A mere scintilla of evidence is insufficient to present a question for the jury. *Boeing*, 411 F.2d at 374.

To defeat Tulane's Motion for Summary Judgment, Rubinstein had to produce evidence that, taken as a whole, created a fact issue as to whether Tulane's stated reasons were not the true motivation for the actions or that created a reasonable inference that either his national origin or religion were determinative factors in the employment action. *Grimes v. Texas Dept. of Mental Health & Mental Retardation*, 102 F.3d 137, 143 (5th Cir. 1996). Rubinstein was required to present evidence sufficient to create a reasonable inference of discriminatory intent. *Id.*; *LaPierre*, 86 F.3d at 451. He did not. This Court's ruling in *Reeves* has not changed these requirements.

In the instant case, after reviewing the record, the Fifth Circuit correctly determined that Rubinstein's scanty evidence of discrimination was insufficient to survive Tulane's Motion for Summary Judgment:

> Rubinstein has failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive so as to

> support an inference that the real reason was discrimination. In fact, the only evidence offered by Rubinstein in support of his claims of discriminatory intent relate to the comments made by Professor Watts, a member of the relevant committees responsible for making promotion and pay-raise decisions, that Rubinstein was a "Russian Yankee" and that Jews are thrifty, as well as an isolated remark by a Professor Bruce, also a member of the relevant committees, that if "the Russian Jew" could obtain tenure, then anyone could.
>
> These comments, standing alone, will not defeat summary judgment on Rubinstein's claims of discrimination in the promotion and pay-raise decisions.

(Appendix A, pp. 12a-13a, Tulane's Petition for a Writ of Certiorari, 00-789).

Rubinstein erroneously contends that *Reeves* confirms that the Fifth Circuit erred in affirming the district court's summary dismissal of Rubinstein's discrimination claims. But the facts of *Reeves* are not analogous to the instant facts, and *Reeves* provides no support for Rubinstein's argument.

In *Reeves*, by introducing evidence that he kept accurate records, the plaintiff successfully proved that the defendant's proffered reason for dismissing him — failing to keep accurate attendance and tardiness records of employees — was pretextual. There, Reeves "made a substantial showing that [his employer's] explanation was false." 120 S. Ct. at 2107.

In the instant case, however, Rubinstein failed to offer sufficient evidence to show that Tulane's reasons for refusing to promote him to Full Professor (poor student evaluations and unfavorable university citizenship) or in refusing to award him raises (in light of his already above-average salary) were false or veiled any discriminatory animus. As the court of appeals recognized, the record substantially supports a finding that Rubinstein is an ineffective teacher. (Appendix A, p. 11a, Tulane's Petition for a Writ of Certiorari, 00-789). The record also contains evidence that Rubinstein was well paid in comparison to his own colleagues as well as other university professors at Tulane and across the nation. (R.10, 2000). Thus, unlike the claimant in *Reeves*, Rubinstein did not present sufficient evidence to rebut Tulane's well-supported, legitimate reasons for denying him a promotion.

Moreover, contrary to Rubinstein's contention, the Fifth Circuit has not issued "a pattern of decisions that contravene the principles expressed in *Reeves*". Rather, Fifth Circuit decisions have properly applied this Court's analysis in *Reeves* and have correctly granted summary judgment or judgment as a matter of law when the claimant could not sufficiently prove that the defendant's proffered reasons were pretextual. This Court has acknowledged that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' " *Reeves*, 120 S. Ct. at 2110 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)).

In *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899 (5th Cir. 2000), the claimant alleged age and race discrimination after being demoted from management to a

staff position. Crawford proved that he was demoted, that he was qualified for the position, that he was within the protected class when he was demoted, and that someone not within the protected class replaced him, thereby establishing a prima facie case under *Burdine*, 450 U.S. at 253 n.6. Formosa then met its burden of producing evidence of non-discriminatory motives for Crawford's demotion by showing that Crawford had experienced an ongoing clash with his supervisor (who was also demoted) and that his department had experienced low productivity and morale and lost two employees, prompting an evaluation. The evaluation revealed that Crawford was not performing his management tasks at a desired level. *Crawford*, 234 F.3d at 901.

The burden then shifted back to Crawford to present " 'sufficient evidence to find that the employer's asserted justification is false.' " *Id.* at 903 (*quoting Reeves*, 120 S. Ct. at 2109). The Fifth Circuit noted that it is "possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination." *Crawford*, 234 F.3d at 903. The determination of pretext and of whether discrimination was the real reason for the adverse employment action must be made on a case-by-case basis, "depending on the nature, extent, and quality of the evidence." *Id.*

Crawford's evidence of pretext included evidence that *his supervisor's* performance was substandard, but Crawford provided little if any proof that Formosa's reasons for demoting him were false. Thus, even though Crawford had proven his prima facie case by showing that he was replaced by a white male under 40 years of age and that his replacement, though temporary, was not qualified for the promotion, "it would not have been unreasonable for the

company to seek a fresh start in the troubled department." *Id.* Applying both this Court's decision in *Reeves* and the Fifth Circuit's decision in the instant case, the *Crawford* panel ruled that the evidence Crawford offered to rebut the non-discriminatory reasons his employer had produced was " 'not so persuasive as to support an inference that the real reason was discrimination.' " *Id.* at 904 (*quoting Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000)). The Fifth Circuit therefore affirmed the district court's summary dismissal of Crawford's discrimination claims.

Similarly, in *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000), *cert. denied*, 00-806 (1/16/2001), 2001 WL 32522, the claimant, originally from Iran, was a tenured professor in the department of petroleum engineering, though he had completed the course work necessary for a Ph.D. in chemical engineering and had done his dissertation on a chemical engineering topic. After the university eliminated the petroleum engineering department, Vadie applied for positions in the chemical engineering department. But when his application was repeatedly denied, he filed suit against the university alleging discrimination based upon his national origin. The jury found in favor of Vadie, and MSU moved for judgment as a matter of law. The district court denied the motion but the court of appeals reversed on the discrimination claim, finding that Vadie "offered absolutely no evidence of national origin discrimination." *Id.* at 372.

In reaching this result, the Fifth Circuit distinguished the *Vadie* facts from *Reeves*, agreeing that its decision to dismiss Vadie's discrimination claims was not inconsistent with this Court's recent ruling. Quoting from *Reeves*, the *Vadie* Court recognized that " 'if the record conclusively

revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' " then the claimant has failed to make an adequate showing, and the defendant is entitled to judgment as a matter of law. *Vadie*, 218 F.3d at 373 n.23 (*quoting Reeves*, 120 S. Ct. at 2109).

As in *Crawford* and *Vadie*, the evidence that Rubinstein offered to refute Tulane's reasons for refusing him a pay raise and a promotion simply does not prove that Tulane's reasons for denying a promotion and pay raise were false. The Fifth Circuit correctly recognized in this case that even when considered in the light most favorable to him, Rubinstein's evidence of discriminatory animus is insufficient to survive summary judgment. Without more, Rubinstein could not and did not meet his burden of proof under the *McDonnell Douglas* three-part test, given Tulane's abundant and uncontroverted independent evidence that no discrimination had occurred. *Reeves* has not shifted the plaintiff's burden of proof or amended the law; indeed, the Fifth Circuit appropriately relied upon *Reeves* to support its decision in the instant case, a decision the court of appeals made when looking at the record " 'taken as a whole.' " *Reeves*, 120 S. Ct. at 2110 (*quoting Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Contrary to Rubinstein's assertions, the district court properly granted, and the court of appeals properly affirmed, summary judgment consistent with *Reeves* and in Tulane's favor on all of Rubinstein's claims of discrimination.

II. This Case is Not the Appropriate Vehicle for Evaluating the "Stray Remarks" Doctrine

This Court recently reversed the Fifth Circuit's decision in *Reeves* when the appellate panel failed to review all of the evidence in the light most favorable to the non-mover. The Fifth Circuit had erroneously required Reeves to provide additional, independent evidence (in addition to his evidence of pretext) to survive judgment as a matter of law. By requiring Reeves to provide additional independent evidence, and then finding that the supervisor's age-related comments " 'were not made in the direct context of Reeves' termination[]' " 120 S. Ct. at 2111 (*quoting Reeves*, 197 F.3d at 693), this Court found that the Fifth Circuit had imposed an inappropriate burden on the plaintiff. " '[I]n passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of' the nonmoving party." *Reeves*, 120 S. Ct. at 2110 (*quoting Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949)).

In the instant case, the Fifth Circuit properly applied this Court's opinion in *Reeves* when it held that Rubinstein had "failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive so as to support an inference that the real reason was discrimination." (Appendix A, p. 12a, Tulane's Petition for a Writ of Certiorari, 00-789). The Fifth Circuit reached this decision prior to its reference to the "stray remarks" doctrine, which was not essential to its holding. In other words, with or without applying the "stray remarks" doctrine to the instant facts, Rubinstein's evidence, unlike Reeves' evidence, did not establish that

Tulane's reasons for denying him a promotion and pay raise were pretextual, even when examined in the light most favorable to him. Therefore the evaluation of any evidence under the "stray remarks" doctrine was unnecessary.

In short, even if this Court's opinion in *Reeves* casts doubt on the viability of the "stray remarks" doctrine, it is not appropriate for review under these circumstances because the Fifth Circuit need not have relied upon that doctrine when it affirmed the summary dismissal of Rubinstein's discrimination claims. Instead, the Fifth Circuit properly applied this Court's ruling in *Reeves* to find that Rubinstein's evidence of discrimination failed to establish pretext. The viability of the "stray remarks" doctrine is not an issue.

III. Rubinstein Has No Basis to Seek Certiorari Review of the Punitive Damage Award

Rubinstein likewise has no basis in his conditional cross-petition to ask this Court to review and reinstate the $75,000 punitive damage award that the Fifth Circuit reduced on remittitur to the sum of $25,000 on his Title VII retaliation claim concerning the denial of a pay raise in 1997-98. On remand to the district court, Rubinstein accepted the Fifth Circuit's remittitur "under protest" rather than choosing a new trial. He thereby waived any right to seek this Court's review of the punitive damage award.

In *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977), this Court reaffirmed its "consistent" and "longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order that he has accepted." Even if the plaintiff accepts the remittitur "under protest," he cannot

thereafter challenge the remittitur on further appellate review and seek to reinstate the original verdict. *Id.* at 649-650. Although Rubinstein contends that the *Donovan* holding does not apply here because the Fifth Circuit granted the remittitur on appeal rather that the district court, he raises a distinction without a difference. On remand after the Fifth Circuit's opinion, the district court executed the court of appeals' mandate and ordered Rubinstein to choose between accepting the remittitur or undergoing a new trial. Rubinstein gave notice to the district court that he rejects a new trial and "choses [sic] remittitur under protest, with a reservation of rights to seek writs to the United States Supreme Court on the remittitur issue and all other issues in the case." (Appendix 2, Rubinstein's Conditional Cross-Petition for a Writ of Certiorari, 00-996). But despite his "reservation of rights," *Donovan* holds that Rubinstein has waived the right to raise any issue concerning punitive damages or the right to a new trial on any other issue presented in his conditional cross-petition for certiorari.

Thus, the only issues concerning punitive damages properly before this Court are those that Tulane has raised in its original Petition for Writ of Certiorari, No. 00-789. Punitive damages in this case were erroneously awarded and should be struck in their entirety, especially in light of the lower courts' misapplication of the law that applies to Rubinstein's sole-surviving retaliation claim. Hence, if this Court grants Tulane's petition for a writ of certiorari either to consider whether Tulane was entitled to a judgment of dismissal as a matter of law or to consider whether Tulane may present evidence of its good-faith compliance with Title VII under *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) in a new trial, then issues of quantum and standard of review of the punitive damage award are moot. Stated differently, because Rubinstein's conditional cross-petition

for a writ of certiorari may only be granted if Tulane's petition is granted, *see* U.S. Supreme Court Rule 13.5, this Court's decision to grant Tulane's petition would render Rubinstein's punitive damage issues merely hypothetical.

Furthermore, even if these issues were not waived or mooted, Rubinstein's arguments that: (a) his 3.5% prospective pay raise should have been considered when calculating punitive damage; and (b) the 30 to 1 ratio of punitive to compensatory damages was not excessive simply have no basis in law. Additionally, Rubinstein's implicit request for reinstatement of the district court's punitive damage award cannot survive either a *de novo* or an abuse-of-discretion standard of review, and therefore, unlike *Cooper Industries v. Leatherman Tool Group, Inc.*, No. 99-2035, (*cert. granted* 10/10/2000), this Court's review of that issue here is inappropriate.

First, with regard to Rubinstein's argument that prospective damages should have been considered when calculating a punitive damage award, Rubinstein fails to point out that no additional harm was likely to result because he has already been awarded, albeit erroneously, a 3.5% pay raise. The only element of compensatory damages awarded was $2,500 in back pay, which the court of appeals correctly recognized as the appropriate basis for comparison in determining punitive damages. Furthermore, the "harm" that Rubinstein alleges that the court of appeals should have considered, $33,000-$40,000 over the next ten years, is unfounded and has no support in the lost-wage judgment. Rubinstein fails to explain how or why he invokes a ten-year time period to conveniently reach a 2 to 1 ratio, and cross-respondent knows of no justification for this time period.

Second, the 30 to 1 ratio between the punitive damage and compensatory damage awards was clearly excessive and justified a remittitur. Rubinstein has failed to enunciate any reason for this Court to revisit its prior decisions on the ratio issue, especially in light of Rubinstein's failure to prove that punitive damages are even warranted here. In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this Court found a punitive ratio of 4 to 1 may be "close to the line," though it approved a 10 to 1 ratio in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). More recently in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court again refused to "draw a bright line" when assessing whether the ratio is inappropriate, but it disparaged a possible ratio of 35 to 1 when discussing the grossly excessive award therein.[1] A 30 to 1 ratio is much closer to ratios that this Court has disapproved, and it is grossly excessive here.

Moreover, this Court has pointed out that even though there is no formulaic means by which to determine a "reasonable" punitive damage award, the degree of reprehensibility must come into play when evaluating the award. *BMW*, 517 U.S. at 575. Because Rubinstein has failed as a matter of law to prove that Tulane is even liable, much less that Tulane's actions were reprehensible, malicious, or recklessly indifferent under 42 U.S.C. § 1981a, *any* award of punitive damages is grossly excessive, and the appropriate ratio need not be revisited under the instant facts.

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1. *See BMW*, 517 U.S. at 582 n.35, in which this Court stated: "Even assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's."

Finally, though Rubinstein asserts that this Court has granted a writ of certiorari in *Cooper Industries v. Leatherman Tool Group, Inc.*, 99-2035 (*cert. granted* 10/10/2000), to address the standard of review that applies to allegedly constitutionally excessive punitive damage awards, Rubinstein's final attempt at presenting a certiorari-worthy issue in this case also falls short. As the Fifth Circuit noted, Rubinstein did not even respond to Tulane's alternative arguments for a remand or remittitur. (Appendix A, p. 29a, Tulane's Petition for a Writ of Certiorari, 00-789). Moreover, under either a *de novo* or abuse-of-discretion standard of review, the court of appeals should not have condoned an award of *any* punitive damages. Thus, this case is inappropriate for considering any of Rubinstein's arguments seeking to reinstate the original punitive damage award.

CONCLUSION

Rubinstein's conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

ASHER RUBINSTEIN,

Cross-Petitioner,

v.

ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND,
PAUL MICHAEL LYNCH,
AND WILLIAM C. VAN BUSKIRK,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner Asher Rubinstein submits this reply to Tulane's opposition to his conditional cross-petition for writ of certiorari. For ease of reference, this reply uses the same headings as the cross-petition.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS CONTINUES, EVEN AFTER *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, TO ARROGATE UNTO ITSELF THE ROLE OF THE JURY IN EMPLOYMENT DISCRIMINATION CASES.

Much of Tulane's opposition is spent arguing the facts. But the problem here, as set out in the conditional cross-petition, is that the Fifth Circuit, even after *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), is resolving such factual arguments itself rather than leaving those to juries.

Tulane argues at length that Professor Rubinstein was denied promotions and raises because he had low student evaluations, was a poor university citizen, and already was well-paid. Op. Cross-Cert. at 3-11. But the contention that he already was well-paid was never proffered during the summary judgment phase as a reason for these adverse actions. *See* the appendix to the petition for writ of certiorari in *Administrators of the Tulane Educational Fund v. Rubinstein*, No. 00-789 at 70a ("pet. app."). As for the other reasons, the Fifth Circuit pointed out that "[t]he

District Court found some evidence of pretext, specifically with regard to Rubinstein's purported lack of university citizenship." Pet. App. 11a. The District Court itself said:

> [A] reasonable jury could find that defendants' proffered legitimate non-discriminatory reasons – plaintiff's poor relations with students and failure to mentor students – were not credible. Accordingly, plaintiff has presented evidence from which a reasonable jury could find that these proffered reasons for denying plaintiff the benefits he sought – that plaintiff's university citizenship and student relations were low – were pretextual.

Pet. App. 75a.

Under this Court's decisions, this pretext generally is enough for a jury to conclude that all of the employer's reasons are contrived.

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992).

Reeves, 120 S.Ct. at 2108.

Moreover, while Tulane cites the student evaluations,[1] the Fifth Circuit noted that Professor Rubinstein's tenure recommendation stated he was a "satisfactory teacher," and that there was evidence that his supervisors had tampered with and altered student evaluations to stack the deck against him. Pet. App. 2a-3a, 12a. As this Court stated in *Reeves*, a "suspicion of mendacity" can lead a jury to conclude that discrimination was at work rather than the employer's stated reasons. 120 S.Ct. at 2108.

In addition, Tulane's proffered reasons are contradicted by the explicit remarks of Tulane decisionmakers indicating that they may have been motivated by religion and national origin. Dean William Van Buskirk told Professor Rubinstein that Department Chair Paul Michael Lynch may well have denied Rubinstein a raise because Rubinstein is Russian and Jewish. After Rubinstein was given the lowest raise in the department in 1994, Van Buskirk said: "what are you going to do, sue me? Do you know what happens to people who sue their employer?" Professor Watts made anti-semitic remarks, and also called Rubinstein a "Russian Yankee" and a "commie." Professor Bruce told another professor that if "the Russian Jew" could obtain tenure, anyone could. Pet. App. 11a-13a, 16a-17a. The comments by all of these decisionmakers create a factual issue as to whether national origin

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[1] Tulane emphasizes that Rubinstein's five year student evaluation average is in the bottom third of the Engineering School. Tulane does not mention that Rubinstein's scores were better than American-born Dr. Kirk Bundy, who was promoted to full professor. R. 4, 719, 761, 895 & 896.

and religion motivated the treatment of Professor Rubinstein, not the reasons given by Tulane.

Unfortunately, the Fifth Circuit made the same mistake in this case that it did in *Reeves*. It "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." 120 S.Ct. at 2111. As in *Reeves*, the Fifth Circuit erred here, and this Court granted certiorari to correct this recurring problem.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE FIFTH CIRCUIT'S "STRAY REMARKS DOCTRINE" SURVIVES THIS COURT'S DECISION IN *REEVES*.

Tulane argues that the Fifth Circuit's reliance upon its "stray remarks" doctrine was simply an alternative holding that was nothing more than dictum. Op. Cross-Cert. at 15-16. But that is simply wrong.

As this Court has made clear, once a prima facie case is made, and once the defendant presents evidence of proffered reasons, all presumptions disappear "and the sole remaining issue [is] discrimination vel non." *Reeves*, 120 S.Ct. at 2106 (internal quotations omitted). Proof of pretext is "one form of circumstantial evidence that is probative of intentional discrimination," *id.* at 2108, and another form is direct evidence of discrimination through discriminatory remarks. *Id.* at 2111. Here, as mentioned earlier, the plaintiff not only presented evidence of pretext, but also of discriminatory comments by decision-makers.

But the Fifth Circuit completely discounted the evidence of discriminatory comments because of its "stray remarks" doctrine.

> In this case, Rubinstein fails to offer evidence that the comments he complains of are either proximate in time to his failure to receive raises or promotions, or that the comments are related to the employment decisions at issue. The only evidence he offers is that the comments were, in fact, made. Our careful review of the record indicates that these comments are best reviewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment. Summarized, our careful review of all the summary judgment evidence presented, viewed in the best light to the non-movant's claims, mandates the conclusion that the evidence taken together does not raise a legitimate fact issue as to discriminatory intent with respect to Rubinstein's discrimination claims.

Pet. App. 13a-14a. Thus, the "stray remarks" doctrine, used to nullify the discriminatory statements of decision-makers, was not dictum, but instead was an integral part of the Fifth Circuit's holding preventing the submission of the discrimination claims to a jury. As discussed in our conditional cross-petition, this Fifth Circuit doctrine is subject to question after this Court's decision in *Reeves*, and this Court should grant certiorari to decide if it survives *Reeves*.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT ISSUES REGARDING JUDICIAL REVIEW OF PUNITIVE DAMAGE VERDICTS BY JURIES THAT ARE RAISED BY THIS CASE.

Tulane argues first that under *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), Professor Rubinstein's response to the District Court's order implementing the Fifth Circuit's decision, requiring him to choose between the remittitur or a new trial, precludes any review by this Court on certiorari. For the reasons stated in footnote 1 of our conditional cross-petition, the punitive damages issues raised by the cross-petition are not foreclosed. At the very least, this Court should grant the cross-petition and decide the matter after briefing and argument, determining if its consideration of a Court of Appeals remittitur is precluded simply because the plaintiff chooses the lesser of two evils in response to a district court order on remand.[2]

Tulane next contends that if its petition for certiorari is granted, Rubinstein's claims regarding the Fifth Circuit's remittitur "are moot." Op. Cross-Cert. at 17. But

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[2] Not only does Tulane argue "that Rubinstein has waived the right to raise any issue concerning punitive damages" but also concerning "the right to a new trial or any other issue presented in his conditional cross-petition for certiorari." Op. Cross-Cert. at 17. But that makes no sense. Professor Rubinstein never had a trial on his discrimination claims. The decision he made on remand regarding the punitive damages remittitur relating to the retaliation claim in no way forecloses him from contending that he should be granted a trial on the separate discrimination claims.

they are moot only if Tulane wins on the merits. If not, Rubinstein's issues remain alive. Thus, if Tulane's petition is granted, the cross-petition should be granted as well.

With respect to the Fifth Circuit's failure to include the 3.5% pay raise award in calculating the damages against which the ratio of a punitive award is to be measured, Tulane argues that "no additional harm [is] likely to result" to Rubinstein because he has, in fact, been awarded the pay raise. Op. Cross-Cert. at 18. But that does not matter. The proper calculation considers not only compensatory damages, but also "the harm to the victim that would have ensued *if the tortious plan had succeeded.*" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996) (emphasis added).

Tulane also contends that the ten year period used to measure this likely harm "is unfounded." Op. Cross-Cert. at 18. But the figure is based on record evidence cited in the conditional cross-petition and is simply illustrative of the fact that the ratio of punitive damages to the actual harm in the case is much less than the 30 to one ratio relied upon by the Court of Appeals to override the jury's punitive damage verdict.

Amazingly, Tulane claims that "*Rubinstein* has failed as a matter of law to prove that Tulane is even liable, much less that Tulane's actions were reprehensible, malicious, or recklessly indifferent. . . . " Op. Cross-Cert. at 19. But as the Fifth Circuit held, Tulane's actions "demonstrate a high degree of reprehensibility. . . . " Pet. App. 30a.

Finally, Tulane noted the Fifth Circuit's statement that Rubinstein failed in that Court to take a position on whether, if the punitive award was reduced, the Fifth Circuit should itself specify the remittitur amount or remand to the District Court to decide the matter. Pet. App. 29a. But that in no way forecloses Rubinstein from challenging the Fifth Circuit's utilization in the first place of a de novo standard of review in upholding Tulane's challenge to the jury's punitive verdict. That is the same issue upon which this Court granted certiorari in *Cooper Industries v. Leatherman Tool Group, Inc.*, No. 99-2035, and it also is squarely presented here.

CONCLUSION

For the foregoi..g reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

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